LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
APR 3 1968
JOHN F. DAVIS, CLERK

No. 1197

In the Supreme Court of the United States

OCTOBER TERM, 1967

ROY ELDER MCKOY AND PATRICIA MCKOY,
dba BELVOIR RESTAURANT, PETITIONERS

v.

UNITED STATES OF AMERICA BY RAMSEY CLARK,
ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
STEPHEN J. POLLAK,
Assistant Attorney General,
GARY J. GREENBERG,
Attorney,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1197

ROY ELDER MCKOY AND PATRICIA MCKOY,
dba BELVOIR RESTAURANT, PETITIONERS

v.

UNITED STATES OF AMERICA BY RAMSEY CLARK,
ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners seek a determination that Title II of the Civil Rights Act of 1964 violates the First, Fifth, Sixth, Seventh, Ninth, Tenth and Thirteenth Amendments to the Constitution. Their contentions are plainly insubstantial.

1. On October 17, 1966, the United States instituted this action, pursuant to Section 206(a) of Title II of the Civil Rights Act of 1964,[1] to enjoin petitioners from discriminating against Negroes in the operation of the Belvoir Restaurant, which they own and operate. Petitioners filed no answer to the com-

[1] 42 U.S.C. 2000a-5(a).

295-451—68

plaint, but submitted a letter to the United States Attorney insisting that they would "continue to conduct [their] business as [they] see fit * * *" (Pet. 8). After a hearing on January 27, 1967,[2] the district court entered a permanent injunction against petitioners, enjoining them from engaging in racial discrimination (Pet. App. A14–A15; 12 Race Rel. L. Rep. 1030). On January 28, 1967, a certified copy of the order was personally served on petitioners. No appeal was taken from this injunction.

On March 9, 1967, three students—two Negroes and one white—were refused service at the Belvoir Restaurant, and the United States instituted civil contempt proceedings. At the hearing held on this motion on April 28, 1967, petitioners appeared and were represented by counsel. Petitioners sought relief from the permanent injunction, principally on the ground that it was based upon an allegedly unconstitutional statute. Terming this assertion "plainly frivolous" (Pet. App. A4) in light of this Court's decisions sustaining Title II, the district court denied the motion to set aside the injunction, found both petitioners in contempt, and ordered Mr. McKoy imprisoned for sixty days or until he purged himself by stating his intention to comply with the injunction. After spending the weekend in confinement, Mr. McKoy purged himself of contempt on May 1, 1967, by agreeing to serve all persons without discrimination. Petitioners then appealed the district court's

[2] Petitioners had personal notice of the hearing but did not appear.

refusal to dissolve the permanent injunction, and on December 4, 1967, the Court of Appeals for the Fourth Circuit affirmed *per curiam,* 387 F. 2d 144 (Pet. App. A1–A2).

2. Petitioners urge that Title II of the Civil Rights Act (42 U.S.C. 2000a—2000a–6) violates the United States Constitution. As they recognize, however (Pet. 10), this Court upheld the constitutionality of Title II in *Atlanta Motel* v. *United States,* 379 U.S. 241, and *Katzenbach* v. *McClung,* 379 U.S. 294. In *Atlanta Motel,* the Court expressly rejected Fifth and Thirteenth Amendment claims (379 U.S. at 258–261), and of course the determination that the Act is a valid exercise of the Commerce Power necessarily refutes any defense based on the Ninth or Tenth Amendment. Petitioners offer no reason why this Court should now reconsider these unanimous holdings.

Petitioners' First Amendent claim, apparently resting on a "freedom of non-association" (Pet. 2, Quest. 4), ignores the fact that even at common law one who undertook to become an innkeeper obliged himself to serve all orderly patrons. Title II merely provides federal protection for this right to public accommodations.

The assertion of a right to a jury trial is also frivolous. Since these were not criminal proceedings, the Sixth Amendment is inapposite, and would not in any event guarantee a jury trial where less than a six-month sentence resulted. *Cheff* v. *Schnackenberg,* 384 U.S. 373. The Seventh Amendment, of course, guarantees a jury in civil trials only in suits

at common law, and thus a jury is not required in suits in equity for an injunction,[3] or in civil coercive contempt proceedings. *Shillitani* v. *United States*, 384 U.S. 364, 365. Moreover, in Section 1101 of Title XI of the Act, 42 U.S.C. 2000h, Congress expressly declined to create a right to trial by jury in civil contempt proceedings to secure compliance with the Act.

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

ERWIN N. GRISWOLD,
Solicitor General.

STEPHEN J. POLLAK,
Assistant Attorney General.

GARY J. GREENBERG,
Attorney.

APRIL 1968.

[3] See *United States* v. *Louisiana*, 339 U.S. 699, 706; *Adams* v. *Fazzio Real Estate Co.*, 268 F. Supp. 630, 640 (E.D. La.) (citing the legislative history which shows that Congress did not intend there to be jury trials in suits brought under Title II).

U.S. GOVERNMENT PRINTING OFFICE: 1968